

HAIRANI BIN SULONG

v.

PUBLIC PROSECUTOR

HIGH COURT, KUCHING
 TUAN RICHARD MALANJUM JC
 [CRIMINAL APPEAL NO. KG. 51 OF
 1992 (III)]
 11 JANUARY 1993

CRIMINAL LAW: Rape - Statutory rape - Section 376 of the Penal Code (FMS Cap 45) - Appeal against conviction - Possibility of concoction by complainant - Whether apparent - Delay in reporting to the police and action taken by parents - Whether evidence of concoction - Cautioned statement of appellant - Whether admissible - Allegation of threat by complainant's father - Whether there was evidence of such threat - Discrepancy - Whether part only of statement could be accepted - Significance of discrepancies - Blood tests not by government medical officer - If results omitted - Whether verdict would be affected - If results admitted - Whether would occasion failure of justice - Section 422 of the Criminal Procedure Code (FMS Cap 6) - Whether applicable - Appeal against sentence - Whether sentence manifestly excessive or erroneous or improper - Offence of statutory rape - Aggravating factors - Whether warranted custodial sentence - Whether sentence manifestly excessive - Delay in reporting - Whether a mitigating factor.

CRIMINAL PROCEDURE: Results of bloods tests - Whether admissible - If assumed to have been conducted by person not government medical officer - Whether admission would occasion a failure of justice - Section 422 of the Criminal Procedure Code (FMS Cap 6) - Whether applicable.

The appellant was charged and convicted of an offence of rape punishable under s. 376 of the Penal Code (FMS Cap 45). He was sentenced by the Sessions Court to 10 years imprisonment and to be whipped 4 times. The appellant appealed against conviction and sentence.

In January 1990, the complainant, who was a student at the time, was staying with her parents in a one-room house. She and her 3 younger siblings slept in the lounge. In January 1990, the appellant, who was the younger brother of the complainant's father, came to stay with the family. He too slept in the lounge, though in another spot. The

a complainant alleged that one day, in the same month, between midnight and morning, the appellant forced himself upon her and raped her. She had not screamed as she was frightened, and had not told anyone as the appellant had threatened to hurt her, as there was a family crisis at that time, and as her father was a hot-tempered man who always sided the appellant. Subsequently, the complainant gave birth to an infant. A police report was lodged on 26 November 1990.

Held:

c A. Appeal against conviction

[1] In the final analysis and on the totality of the evidence adduced, ground one regarding discrepancies had no merit, in particular on the possibility of concoction. The complainant's explanation regarding the delay in reporting the commission of the offence was reasonable. In any case, delay in reporting an offence such as rape should not be taken as evidence of concoction without more. The reason for the delay should be considered in the light of the other relevant and admissible evidence available before any conclusion is arrived at. The fact that the parents had not taken action earlier too had acceptable explanations.

d [2] There was no merit in the submission that the cautioned statement of the appellant was not admissible, as having been obtained by means of a threat by the father of the complainant. There was no possibility of such a threat having been made. The appellant in his statement had made it out that it was the complainant who had asked him to have sexual intercourse, not realising that the offence committed was a statutory rape and the element of consent was therefore not relevant. Even if the act had been committed in May 1990, as mentioned in the statement, the complainant would have been under the age of 16 years. It is settled law that a trial Court is entitled to accept part of a cautioned statement and reject the rest. Further, discrepancies in the evidence of witnesses is a matter which might well be thought to be in favour of their truthfulness rather than the reverse.

e [3] As the Court had found no merit in the other submissions, then the third submission, that there was a reasonable doubt or gap on the ingredients of the offence charged, too would be found to have no merit. The

admission of the blood test results of the infant born to the complainant, and the appellant, only gave the possibility of the appellant being the putative father. The admission of the results, even on the assumption that the witness who conducted the test was not a government medical officer or expert, did not occasion a failure of justice and s. 422 of the Criminal Procedure Code (FMS Cap 6). There was other corroborating evidence rightly relied on by the Sessions Court Judge.

B. Appeal against sentence

[1] Custodial sentence was the appropriate punishment. In the present case, there were aggravating features of the crime, namely, the complainant was very young, the appellant was in a position of trust and the complainant had been harassed subsequently.

[2] The sentence passed was not manifestly excessive or erroneous or improper in the circumstances. The offence was of statutory rape. In addition to the other aggravating factors, there was the likely subsequent negative effect of the offence on the complainant psychologically, emotionally and socially in relation to the community she belong to. The delay in reporting the incident was not a mitigating factor, especially in view of the explanation given for the delay.

[Appeal against conviction and sentence dismissed].

Cases referred to:

Public Prosecutor v. Ma'arif [1969] 2 MLJ 65 (**refd**)
Public Prosecutor v. Wan Razali Kassim [1970] 3 MLJ 79 (**refd**)
Doyle v. Olby Ltd. [1969] 2 QB 159 (**fol**)
Wong Lai Fatt v. Public Prosecutor [1973] 2 MLJ 31 at p. 33 (**fol**)
R v. Smith [1959] 2 QB 35 (**refd**)
Deokinanan v. Queen [1969] AC 20 (**refd**)
Lim Yow Choon v. Public Prosecutor [1972] 1 MLJ 205 (**fol**)
LeoFernanado v. Reg. [1959] 25 MLJ 157 at p. 159 H (**fol**)
Public Prosecutor v. Lin Lian Chen [1990] 2 CLJ 1020 / [1991] 1 MLJ 316 (**refd**)
Public Prosecutor v. Loo Choon Fatt [1976] 2 MLJ 256 (**refd**)
Public Prosecutor v. Fam Kim Hock [1954] 23 MLJ 20 (**refd**)
R v. Roberts [1982] 1 All ER 609 (**fol**)
R v. Billam [1986] 1 All ER 985 (**fol**)

a Legislation referred to:

Criminal Procedure Code, ss. 399, 422 (FMS Cap. 6)
 Evidence Act 1950, s. 45
 Penal Code, s. 376 (FMS Cap 45)

For the appellant - Sim Thong Poh; M/s. Sim Thong Poh Advocates

b *For the respondents - S. Selvanathan; DPP*

JUDGMENT

Richard Malanjum JC:

The appellant was charged and convicted after a contested trial of an offence of rape punishable under s. 376 of the Penal Code F.M.S. Cap 45. He was sentenced by the learned Sessions Court Judge to 10 years imprisonment and to be whipped 4 times. The appellant appealed against the conviction and sentence.

d After hearing the submissions of the learned Counsel for the appellant and the learned Deputy Public Prosecutor I dismissed the appeal against both the conviction and sentence and stated that I would give my reasons in due course. I do so now.

e The facts as found by the learned Sessions Court Judge were mainly from the testimony of the complainant. The learned Sessions Court Judge found the complainant to be a witness of truth. Nevertheless, independent corroborative evidence were also sought and found by the trial Court before proceeding to convict the appellant.

f Briefly, the testimony of the complainant which was accepted by the learned Sessions Court Judge, was that in January 1990 she was staying with her parents in a one-room house. The parents slept in the bedroom whilst the complainant and her 3 younger siblings slept in the lounge. In the same month the appellant, who is the uncle of the complainant, being the younger brother of her father, came to stay with the family. The appellant also slept in the lounge though on another spot. One evening in the same month the complainant went to bed early as she was tired. Between midnight and morning the complainant woke up she felt someone was pressing on top of her body. When she opened her eyes she saw the appellant. The appellant whispered to her not to make any noise or do something foolish.

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The complainant panicked and was also frightened. When she refused to take off her nightdress when ordered by the appellant, the appellant took off her panties with his one hand whilst the other hand was pressing against her chest. The complainant tried to struggle but was overpowered by the appellant. She did not scream as she was very frightened and that the hand of the appellant was also covering her mouth. After taking off the panties of the complainant the appellant forced himself into her. The complainant felt pain and the appellant ejaculated inside her.

After the act the appellant warned the complainant not to tell anybody about the incident or else he would hurt her. The next day the complainant went to school and she was in Form 4 at that time. The complainant also testified that she did not tell her parents as there was a family crisis in that her parents were always quarrelling. She also said that her father was a very hot-tempered person and always sided the appellant. She did not make any report to the Police as she was then immature and had no such experience before. The complainant stated that it was only the appellant who had sexual intercourse with her at that time.

It is settled law that an appellate Court is slow in interfering with the finding of fact and the assessment of the credibility of a witness by a trial Court. An appellate Court will interfere in a case where the finding is very unreasonable in the circumstances or that the finding is by way of inference which the appellate Court is also in the position to come to a conclusion on [See: *Public Prosecutor v. Ma'arif* [1969] 2 MLJ 65, *Public Prosecutor v. Wan Razali Kassim* [1970] 3 MLJ 79].

In the present case the learned Sessions Court Judge also considered as corroborating evidence to the testimony of the complainant the cautioned statement of the appellant, the evidence of the parents of the complainant, the payment of RM150 to settle the hospital bill by the appellant and the possibility of the appellant being the father of the infant delivered by the complainant based on the result of the blood test.

a Appeal against conviction:

In expressing his dissatisfaction against the conviction the appellant had put forward three grounds namely that:

1. in determining the credibility of the complainant the learned Sessions Court Judge erred in law and in fact in that he failed to consider adequately the various material discrepancies of the complainant especially when the offence was allegedly committed in January 1990 but was only reported on the 26 November 1990;
2. the learned Sessions Court Judge erred in law in admitting the cautioned statement of the appellant on the basis of it having being made voluntarily when from the evidence adduced there were conflicting versions and that the learned Sessions Court Judge failed to consider the evidence of the appellant adequately which omission has therefore occasioned a failure of justice;
3. the learned Sessions Court Judge erred in law in convicting the appellant at the end of the case when there was a reasonable doubt or gap on the ingredients of the offence charged.

I would state here that I was not impressed with the formulation and presentation of the grounds of appeal against conviction. Counsel should not simply put forward any ground of appeal for the sake of quantity and not the quality. Any ground before being put forward should be given serious consideration in law and in relation to the judgment appealed against.

(a) Ground one:

In the present case, on ground one, the gist of learned Counsel's submission was that due to the delay in reporting there was the possibility of concoction by the complainant. But if one was to read the ground as presented it dealt with discrepancies. I was therefore not surprised when the learned Deputy objected to the line of argument taken by learned Counsel for the appellant during the hearing. Anyway, as said by Lord Denning MR in *Doyle v. Olby Ltd.* [1969] 2 QB 159 and referred to in *Wong Lai Fatt v. Public Prosecutor* [1973] 2 MLJ 31 at page 33 that 'we never allow a client

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to suffer for the mistake of his Counsel if we can possibly help it. We will correct it whenever we are able to do so without injustice to the other side'. In the interest of justice I have therefore directed my mind to the point raised by learned Counsel for the appellant. Having examined the Notes of Proceeding and the judgment of the learned Sessions Court Judge I did not think that the possibility of concoction was apparent. The appellant in the course of the trial never raised the issue. No doubt he was not represented by Counsel at the trial but he did raise other issues such as that the complainant always went out at night, that he did go to the family house to visit his brother and nothing else and that it was the father of the complainant who forced her to come to Court. On the other hand, the appellant did not dispute the testimony of the parents of the complainant that the appellant gave RM150 to pay for the hospital bill when the complainant delivered the infant.

The delay in reporting the commission of the offence by the complainant was stressed by learned Counsel for the appellant. But in my view delay in reporting an offence such as rape should not be taken as evidence of concoction without more. The reason for the delay should be considered in the light of the other relevant and admissible evidence available before coming to any conclusion. In the present case the complainant explained the delay in reporting was due to the threat of harm on her by the appellant. The complainant testified that later on the appellant did strangle and push her down after she threatened to inform her parents of the commission of the offence. She found no help from the father on the subsequent incident even though she reported it to him. The other reasons given by the complainant were that her parents were always quarrelling and that her father always sided the appellant and that she was also still immature at that time and had no experience on such matters. In my view her explanation was reasonable.

It was also submitted that the parents of the complainant should have taken action earlier on as the pregnancy of the complainant would have been obvious. Such a submission was based on the assumption that the pregnancy of the complainant was obvious. But no evidence was adduced and the parents were not

a asked by the appellant on this point during the trial. But I posed a question to learned Counsel of the likelihood that the pregnancy might not have been apparent. This was because the complainant was a student at that time and her teachers would have taken action if her pregnancy was obvious. Learned Counsel for the appellant offered no answer. It should also be noted that the appellant is the younger brother of the father of the complainant and in view of the nature of the offence and its effects on the victim a lot of consideration must have been taken into account before making the Police report. In the final analysis and on the totality of the evidence adduced I found no merit on ground one in particular on the possibility of concoction.

(b) Ground two

d This was on the admission of the cautioned statement of the appellant. It was submitted that although there was no threat coming from the recording officer there was infact a threat from the father of the complainant and which was communicated to the Investigating Officer some time after the cautioned statement was recorded. Yet, as learned Counsel submitted, the Investigating Officer was not called by the Prosecution during the trial within a trial to rebut the allegation of threat made to the appellant by the father of the complainant. The prosecution/respondent reply to this submission was that the threat from the father of the complainant could not be true as the appellant was arrested at 9.00 a.m. and 20 minutes later on the same morning his cautioned statement was recorded. Further, the learned Deputy submitted that even if there was a threat, such a threat did not operate in the mind of the appellant. This was because according to the wife of the appellant the alleged threat was supposedly made the next morning after the delivery of the infant by the complainant which was on the 10 October 1990 at about 1.00 a.m. The appellant was arrested on 1 December 1990. It was also submitted that the allegation of threat told by the appellant to the Investigating Officer was irrelevant as it was made subsequent to the making of the cautioned statement. The cases of *R v. Smith* [1959] 2 QB 35 and *Deokinanan v. Queen* [1969] AC 20 were cited.

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In coming to a conclusion on this issue I asked myself if there was a possibility of such a threat as alleged and if so what was the effect. The gist of the allegation of the appellant was that it was the father of the complainant who forced him to give the cautioned statement. He alleged that the father of the complainant kept on coming to his house to ask him to give the statement. The appellant did not elaborate on the nature of the threat and he did not state when was the threat made. On the other hand the wife of the appellant whilst as a witness for the defence during the trial within a trial stated that the father of the complainant came to the house the morning after the delivery of the infant. She stated that the father forced the appellant to admit otherwise he (the father) would kill the appellant. Having considered the evidence given as recorded in the notes of Proceeding pertaining to the alleged threat and having read the cautioned statement in my judgment I did not think there was such a threat. If the threat was made the next morning after the delivery of the infant there was no question of giving a statement to the Police because at that time there was then no Police report lodged. The Police report was only lodged on 26 November 1990. Further, if the appellant was so threatened and frightened that such fear persisted upon him up to 1 December 1990 there was no explanation given as to when and why such fear disappeared. The contents of the cautioned statement further showed that there could not have been any threat. The appellant in his statement portrayed an incident that it was the complainant who came to him and asked him to have sexual intercourse. The statement as a whole was exculpatory in nature with the appellant not realising that the offence committed was a statutory rape and therefore the element of consent was not relevant in securing a conviction. The basic admission remained in that he had sexual intercourse with the complainant who was then under the age of 16 years. As such the failure by the prosecution to call the Investigating Officer to rebut the alleged threat as submitted did not occasion a failure of justice.

Learned Counsel for the appellant also submitted that in the cautioned statement the appellant mentioned that the time of commission of the offence was in May 1990 whereas the complainant alleged it to be in January 1990. As such, learned Counsel submitted

a that there was a discrepancy in the evidence. However, even if the act was committed in May 1990 the complainant would still have been under the age of 16 years. It is settled law that a trial Court is entitled to accept part of a cautioned statement and reject the rest. [See: *Lim Yow Choon v. Public Prosecutor* [1972] 1 MLJ 205]. Further, discrepancies in the evidence of witnesses 'is a matter which might well be thought to be in favour of their truthfulness rather than the reverse' per Rose CJ in *Leo Fernandez v. Reg.* [1959] 25 MLJ 157 at page 159 H (left).

c Accordingly I did not find any merit in ground two as well.

(c) *Ground Three:*

d On this ground learned Counsel for the appellant submitted that if this Court did not find any merit on grounds one and two, then ground three would not hold much. Learned Counsel was correct in that respect. Ground three only made reference to gaps on the ingredients of the offence charged. Learned Counsel did not elaborate what was the gap if any. I did not find any and I found no merit in ground three.

e In the course of hearing this appeal I posed a question to both the learned Deputy and the learned Counsel for the appellant on the standing of the witness who conducted the test on blood samples of the complainant, the infant and the appellant respectively. Was he a Government Medical Officer or an expert? f The learned Deputy replied that he was a Government Medical Officer as he worked in the Medical Department, Kuching. From the Notes of Proceeding this witness was recorded as working at the Central Medical Laboratory, Medical Department, Kuching. From the exhibits this witness was shown to be a state Pathologist at the Central Medical Laboratory Kuching. From the evidence nothing was shown that he was infact a Government Medical officer as required under s. 399 of the Criminal Procedure Code (F.M.S. Cap 6) or that he was an expert under s. 45 of the Evidence Act 1950. Perhaps it is time for Prosecuting Officers to ensure the standing of witnesses especially if they are called to tender reports or expert opinion and to have such standing adduced and recorded. In the case of *Public Prosecutor v. Lin Lian Chin* [1991] 1 MLJ 316 Mohtar Abdullah J. stated thus at page 317 D (right):

In other words, the prosecution should first establish the expertise of the witness. The opinion which he is asked to give must relate to a matter concerning which his special knowledge will assist the Court. The expert may not give an opinion on matters outside the field of his expertise.

Further down at page 318 B (left), his Lordship observed thus:

I am not unmindful of the right of the prosecution, under s. 399 of the Criminal Procedure Code (F.M.S. Cap. 6), subject to the conditions stated therein, to tender or produce the chemist report in lieu of calling the chemist. In such a case, the chemist report would be admissible in evidence, including of course the chemist's findings that the drug analysed by him is heroin. However, the prosecution had elected to call the chemist (PW2) to give his testimony in Court, and by such election, the prosecution was bound by the rules of evidence to establish that the chemist called to give expert evidence was indeed an expert within the ambit of s. 45 of the Evidence Act 1950.

As for the learned Counsel for the appellant he offered no opinion and appeared to me to have been 'lost' over the issue. So much for the preparation of a case where the liberty of a person was at stake.

Anyway in the present case the results of the blood test were not of much importance. Although the learned Sessions Court Judge referred to them he was also cautious that the blood test results of the infant and the appellant only gave the possibility of the appellant being the putative father. Having read the judgment I did not think that the verdict would have been different if the blood test results were omitted. There were other corroborating evidence relied on by the learned Sessions Court Judge and rightly so. In my judgment therefore the admission of the blood test results even on the assumption that the witness who conducted the test was not a Government Medical Officer or an expert, did not occasion a failure of justice and that s. 422 of the Criminal Procedure Code (F.M.S. Cap 6) would be applicable.

For the above reasons I dismissed the appeal against conviction.

Appeal against sentence:

As to the appeal against sentence learned Counsel for the appellant submitted that the

a sentence passed by the learned Sessions Court Judge was manifestly excessive in the circumstances. He also submitted that as the appellant was not represented during the trial the mitigating factors were not seriously put forward.

b It is settled law that for an appellate Court to interfere with a sentence passed by a lower Court it must be shown that the sentence passed is either wrong in law as amounting to it being illegal or that it is manifestly excessive or inadequate in the circumstances of the case or it is 'otherwise not a proper sentence having regard to all the facts disclosed on the record or to all the facts which the Court ought to take judicial notice of, that is to say, that the lower Court clearly has erred in applying the correct principles in the assessment of the sentence. It is a firmly established practice that the Court will not alter a sentence merely because it might have passed a different sentence', per Hashim Yeop A. Sani J (as he then was) in *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256. [See also: *Public Prosecutor v. Fam Kim Hock* [1954] 23 MLJ 20].

e The present case is an offence of rape, a statutory rape as the complainant was below the age of 16 years when the offence was committed. The minimum term of imprisonment for an offence of rape is five years.

f In the case of *R v. Roberts* [1982] 1 All ER 609 this is what Lord Lane CJ had to say on the purpose and form of punishment for an offence of rape at page 610:

Rape is always a serious crime. Other than in wholly exceptional circumstances. It calls for an immediate custodial sentence. This was certainly so in the present case. A custodial sentence is necessary for a variety of reasons. First of all to mark the gravity of the offence. Second to emphasise public disapproval. Third, to serve as a warning to others. Fourth, to punish the offender, and last, but by no means least, to protect women. The length of the sentence will depend on all the circumstances. That is a trite observation, but these in cases of rape vary widely from case to case.

g Some of the features which may aggravate the crime are as follows. Where a gun or a knife or some other weapon has been used to frighten or injure the victim. Where the victim sustains serious injury (whether that is mental or physical). Where violence is used over and above the violence necessarily involved in the act itself. Where there are

threats of a brutal kind. Where the victim has been subjected to further sexual indignities or perversions. Where the victim is very young or elderly. Where the offender is in a position of trust. Where the offender has intruded into the victim's home. Where the victim has been deprived of her liberty for a period of time. Where the rape, or succession of rapes, is carried out by a group of men. Where the offender has committed a series of rapes on different women, or indeed on the same woman.

The above observation is equally applicable in our Courts.

In the present case there were aggravating features of the crime, namely (i) the complainant was very young; (ii) the appellant was in a position of trust being the uncle. If the parents of the complainant did not trust him he would not have been allowed to sleep in the house or in the same lounge as the complainant and the other children; and (iii) the complainant was harassed subsequently. Thus, custodial sentence is the appropriate punishment.

As to the length of imprisonment to an offender in an offence of rape it is difficult to lay down guidelines. But in the case of *R v. Billam* [1986] 1 ALL ER 985 again Lord Lane CJ had this to say with regard to the length of sentence in terms of years at page 987:

The variable factors in cases of rape are so numerous that it is difficult to lay down guidelines as to the proper length of sentence in terms of years. That aspect of the problem was not considered in *R v. Roberts*. There are, however, many reported decisions of the Court which give an indication of what current practice ought to be and it may be useful to summarise their general effect.

For rape committed by an adult without any aggravating or mitigating features, a figure of five years would be taken as the starting point in a contested case. Where a rape is committed by two or more men acting together, or by a man who has broken into or otherwise gained access to a place where the victim is living, or by a person who is in a position of responsibility towards the victim, or by a person who abducts the victim and holds her captive, the starting point should be eight years.

At the top of the scale comes the defendant who has carried out what might be described as a campaign of rape, committing the crime

a on a number of different women or girls. He represents a more than ordinary danger and a sentence of 15 years or more may be appropriate.

b Where the defendant's behaviour has manifested perverted or psychopathic tendencies or gross personality disorder, and where he is likely, if at large, to remain a danger to women for an indefinite time, a life sentence will not be inappropriate.

The crime should in any event be treated as aggravated by any of the following factors:

- c* (1) violence is used over and above the force necessary to commit the rape;
- (2) a weapon is used to frighten or wound the victim;
- (3) the rape is repeated;
- (4) the rape has been carefully planned;
- (5) the defendant has previous convictions for rape or other serious offences of a violent or sexual indignities or perversions;
- d* (7) the victim is either very old or very young;
- (8) the effect on the victim, whether physical or mental, is of special seriousness. Where any one or more of these aggravating features are present, the sentence should be substantially higher than the figure suggested as the starting point.
- e*

The extra distress which giving evidence can cause to a victim means that a plea of guilty, perhaps more so than in other cases, should normally result in some reduction from what would otherwise be the appropriate sentence. The amount of such reduction will of course depend on all the circumstances, including the likelihood of a finding of not guilty had the matter been contested.

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g The fact that the victim may be considered to have exposed herself to danger by acting imprudently (for instance by accepting a lift in a car from a stranger) is not a mitigating factor; and the victim's previous sexual experience is equally irrelevant. But if the victim has behaved in a manner which was calculated to lead the defendant to believe that she would consent to sexual intercourse, then there should be some mitigation of the sentence. Previous good character is of only minor relevance.

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i I would add another aggravating factor, that is, the likely subsequent negative effect of the offence on the victim psychologically, emotionally and socially in relation to the community she belongs to.

In this case which was a contested one, the appellant was in the position of trust or responsibility towards the complainant being the paternal uncle. The aggravating factors were that

- (i) the complainant was below the age of 16 years and therefore the offence was one of statutory rape;
- (ii) though there was no evidence or further sexual indignities or preversions, the appellant harassed the complainant by strangling and pushing her down when she threatened to tell her parents; and
- (iii) there would be likely subsequent negative effects of the offence on the complainant psychologically, emotionally and socially in relation to the community she belongs to.

I did not think therefore that the sentence passed was manifestly excessive or erroneous or improper in the circumstances. The learned Sessions Court Judge did consider the mitigation of the appellant and I did not find any additional mitigating point submitted by learned Counsel for the appellant during the hearing of this appeal. Learned Counsel submitted that due to the delay in reporting the incident it should be taken as a mitigating factor. He provided no authority for such a submission. Anyway, in this case I did not see how the delay could be a mitigating factor in view of the explanation for the delay given by the complainant during the trial. Accordingly I also dismissed the appeal against sentence.

**a HILL SAMUEL MERCHANT BANK
ASIA**

v.

TACKOH SDN. BHD. & ANOR.

**b HIGH COURT, KUALA LUMPUR
DATO' HAJI ABDUL MALEK BIN HAJI
AHMAD J.
[CIVIL SUIT NO. D5-22-1330-91]
24 OCTOBER 1992**

c PRACTICE & PROCEDURE: Summary judgment - Credit facility agreement - More than two guarantors named in the agreement - Only one of two guarantors executed the relevant guarantee document - Whether agreement remains valid - Whether triable issues raised.

d This was an appeal by the defendants against the decision of the Senior Assistant Registrar granting summary judgment to the plaintiff.

e The question that arose in this case was whether when there are more than two guarantors named in a credit facility agreement with the principal borrower, the said agreement remains valid when only one of the two guarantors had executed the relevant guarantee document.

Held:

f [1] Whether the guarantors are entitled to rely on the non-execution of the guarantee agreement is a triable issue which may call for evidence. It is also not a matter which can be disposed of summarily.

[Appeal allowed with costs].

Cases listed at the end of the judgment as cases referred to:

- g** *Bhai Panna Singh v. Bhai Arjun Singh* [1929] AIR 179
- Khalid Panjang & Ors. Public Prosecutor (No. 2)* [1964] 30 MLJ 108
- Wee Wood Industries Sdn. Bhd. v. Guannex Leasing Sdn. Bhd.* [1990] 2 CLJ 1060
- h** *Teguh Insurance Company Sdn. Bhd. v. Insuna Underwriting Agencies Sdn. Bhd. & 4 Ors.* [1986] 2 CLJ 68 (foll)
- James Graham & Co. (Timber) Ltd. v. Southgate-Sands & Ors.* [1985] 2 WLR 1044 (foll)
- Eushun Properties Sdn. Bhd. & 4 Ors. v. MBf Finance Bhd.* (Supreme Court Civil Appeal No. 02-320-91)
- i** *Trengganu State Economic Dvpt. Corp. v. Nadeffinco Ltd.* [1982] 1 MLJ 365